**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

IN RE HOLOCAUST VICTIM ASSETS LITIGATION **Application of Burt Neuborne**	**Docket No. 06-983 (ERK) (JO)**

SUPERSEDING DECLARATION OF ROBERT A. SWIFT IN OPPOSITION TO LEAD SETTLEMENT COUNSEL'S APPLICATION FOR COUNSEL FEES

Robert A. Swift, an attorney duly admitted to practice before this Court, hereby declares:

1. I am a senior member of the Philadelphia, Pennsylvania law firm of Kohn Swift & Graf, P.C. which is counsel for the Settlement Class in the above-captioned action. I have served as co-chair of the Plaintiffs' Executive Committee during the litigation and settlement of this lawsuit. I was personally involved in the settlement of this litigation, the creation of the Settlement Fund and certain post-settlement motions and appeals. On behalf of the Settlement Class, I oppose Lead Settlement Counsel's Application for Counsel Fees for the reasons set forth herein.

2. I was under the belief that Mr. Neuborne was acting *pro bono* in his role as Settlement Lead Counsel. In paragraph 4 of his Declaration of February 22, 2002 filed with this Court, Mr. Neuborne stated that he was one of the lawyers who

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determined it would be inappropriate to accept fees from members of the settlement class and that their efforts were *pro bono*. There was no statement by him that he had ceased working *pro bono* as of three years before signing his Declaration. Therefore his Application comes as a complete surprise to me. Mr. Neuborne, whose principal occupation is teaching at NYU School of Law, has always advocated that every lawyer in the *Holocaust Victims Assets Litigation* should work *pro bono*. In the District Court and Circuit Court hearings subsequent to the settlement, Mr. Neuborne often mentioned that he was representing Holocaust victims *pro bono*, presumably to augment his own credibility and lessen that of others. In view of his statements, Mr. Neuborne had a professional responsibility to declare timely to the Court and co-counsel that he changed his position and would be seeking a fee. The New York Lawyer's Code of Professional Responsibility addresses this issue in Canon 2-19 ("As soon as feasible after a lawyer has been employed, it is desirable that a clear agreement be reached with the client as to the basis of the fee charges to be made. … It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent.") and Disciplinary Rule 2-106 ("Promptly after being employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined …"). I note that there were engagement letters signed for all my clients in this litigation which referenced a contingent fee. Later on, when asked by the Court, I stated in a letter dated September 27, 2002 to the Court that any time devoted by me to the case after November 30, 2000 would be regarded as *pro bono*.

3. The decision of the District Court in *In re Holocaust Victims Assets Litigation*, 270 F.Supp.2d 313 (E.D.N.Y. 2002) pointed out that in this case there were well qualified lawyers willing to handle the litigation for no fee. Despite my active role in both the litigation and settlement, Mr. Neuborne neither informed me that he intended to seek a fee during the administration of the settlement nor sought to engage the legal skills of me or other settlement class counsel who were acting *pro bono*. Rather, it appears from his Application that he relegated virtually all post-settlement legal work to himself despite the availability of qualified and experienced co-counsel, including myself. This is all the more disturbing because Mr. Neuborne failed to keep me informed of developments or hearings or develop a consensus on legal strategy with co-counsel. My sole source of information was to receive pleadings and briefs or to review the docket entries.

4. I note that Mr. Neuborne asserts in his Supplemental Declaration of March 3 at paragraph 7: "Mr. Swift was not willing to work *pro bono*. Mr. Swift was not even willing to work on an hourly basis." This was true with regard to the liability phase of the litigation, but misstatements regarding work after November 30, 2000. I was willing to, and did, work *pro bono* after November 30, 2000. I

negotiated and believed in the Settlement Agreement as made, and was prepared to assist in its consummation. If his point is that I was not prepared to devote an unlimited number of hours, we are in agreement. Mr. Neuborne has apparently forgotten my assistance in drafting and submitting two affidavits supporting the class' interpretation of the settlement agreement, and my intervention with a group of Roma represented by Ramsey Clark. He may not be aware of the many hours I and my staff devoted to speaking to hundreds of class members who were confused about the settlement and distribution. His decision not to seek more of my assistance is regrettable since, as we now know, the Class did not have Mr. Neuborne's undivided loyalty.

5. Since the Court indicated during the March 3, 2006 conference that Mr. Neuborne merits a fee, I request an evidentiary hearing to resolve the anomalies/discrepancies that appear in his Application. I shall mention those which are suspect.

6. During the post-settlement period Mr. Neuborne was at times representing the Class and at other times, in effect, representing the District Court in upholding its decisions. An example of this occurred in connection with the District Court's hearings and rulings on *cy pres* to the Looted Assets Subclass where Mr. Neuborne never advocated on behalf of the Class or Subclass as a whole but simply on behalf of a minor portion thereof. But for my *pro bono* advocacy,

there would have been no voice for the Class or Subclass as a whole. Time that Mr. Neuborne devoted to representing the District Court should be deducted from his totality of hours. Time that Mr. Neuborne devoted to (unsuccessfully) striking the Class' appellate brief in August/September 2004 should be deducted as well. The Class as a whole should not be charged for Mr. Neuborne's attempt to silence the Class' voice in the appellate court.

7. In the Application I find no objective justification for the $700 hourly rate which Mr. Neuborne requests. Mr. Neuborne does not practice law regularly as a commercial litigator. He cites no client who pays him an hourly rate of $700 per hour. He cites no other law school professor who is paid $700 per hour by clients. In my experience, there are few commercial litigators who receive a rate of $700 per hour from fee paying clients. Those that do are invariably members of law firms which pay overhead (e.g. leases, support personnel, utilities, etc.) based on that hourly rate. I have attached hereto a 2005 chart prepared by a legal consulting firm showing median hourly billing rates by litigation specialty, with the highest median rate being $380 per hour.

8. As a law professor with an office, support staff and utilities furnished by the law school, Mr. Neuborne has virtually no overhead. Professor Neuborne does not state what salary he receives as a law school professor. Assuming he receives $150,000 annually for a 40 hour week, 40 weeks a year, his hourly rate

would be $93.75. Before accepting a lofty hourly rate of $700, the Court must conduct a probing inquiry into the compensation that Mr. Neuborne has received in the past as an academic and a litigator.

9. One of the obligations of a lead counsel in class litigation is to delegate work so that the class receives the benefit of the lowest hourly rate commensurate with the task being performed. An attorney with a billing rate of $700 per hour should not be doing work more appropriate to another capable lawyer with an hourly rate of $200. The Application indicates that there was virtually no delegation of tasks by Mr. Neuborne. For example, a considerable amount of time is listed in the Application for research performed personally by Mr. Neuborne. Usually the entries do not indicate what the research was. I find little justification for the class paying for unspecified research at a rate of $700 per hour especially since Mr. Neuborne had access to law students willing to do research for $15 per hour.

10. The Application contains a compilation of hours worked. However, Mr. Neuborne does not explain what the compilation was prepared from. That is, there is no indication whether there were daily journal entries he made or whether the time listed and tasks performed are after-the-fact recollection. Also, the timekeeping lacks precision since time is rounded to the nearest hour or half hour, not the tenth or quarter of an hour which is the practice in most law firms. I note

that some of the entries are for exceptionally long periods of time and therefore doubtful. Among the entries for single days are:

9/13/03 – 24 hrs.

9/14/03 – 20.5 hrs.

10/13/03 – 25 hrs.

10/14/03 – 16.5 hrs.

3/26/04 – 16 hrs.

3/27/04 – 30.5 hrs.

I am not satisfied by the explanation of Mr. Neuborne's counsel that these entries reflect work performed over two days. The examples stated above cover two-day periods. Even assuming he worked 24 hours in a single sleepless day, he does not account for eating and bathroom breaks; or whether each of the hours spent was of the quality that would be expected of a person billing at $700 per hour.

11. The compilation of time also contains references to conversations, many lasting 2 to 4 hours. Conversations of this length are suspect since, in real practice, conversations of that length are uncommon.

12. On a quantum basis, the compilation is suspect for two years – 2000 and 2004 – in which he purports to spend approximately 1800 hours each. That number of billable hours would be very respectable for an associate in a law firm working fulltime; but highly surprising for a fulltime law professor working

parttime as lead settlement counsel. Full employment as a law school professor should consume, at a minimum, 1600 hours a year. Mr. Neuborne claims he only devoted 150 hours in 2000 because he was on sabbatical leave one semester. That number of hours is highly unlikely since law school professors perform myriad tasks other than teaching, serve on multiple committees and are expected to engage in academic research and writing as part of their compensation – especially during sabbatical leaves. He acknowledges he spent 627 hours in 2000 on the German Holocaust Settlement – a matter on which he received over $4 million of compensation. Assuming a 1,600 hour workyear for the law school, his total professional hours would total 4,027. While it may be mathematically possible for a lawyer to work 4,027 hours in a year -- which equates to 11.03 hours for every day of the year – it is highly unlikely. If accurate, the quality of the hours billed becomes highly suspect. Mr. Neuborne has not explained how he could have devoted 1800 hours in 2004 consistent with his other duties and activities. This raises doubts and commands an explanation of the time he spent on the instant case versus other pursuits.

13. I note that Mr. Neuborne justifies the reasonableness of his $4 million fee request by pointing out that multipliers are often awarded for successful results. A multiplier is irrelevant in post-settlement administration since the fund is already in existence and there is no risk of nonpayment. I acknowledge that two of Mr.

Neuborne's efforts contributed to enhancement of the fund, but because there was no risk taken, no multiplier should be awarded. One of Mr. Neuborne's claimed enhancements -- the post-settlement litigation over interest accruing on the fund -- did not enhance the fund; it merely neutralized a blunder he made in negotiating Amendment No. 1 to the Settlement Agreement. Mr. Neuborne's memory of the consummation of Amendment No. 1 is in error. It was signed in November 1999 (as set forth on the signature page), not 1998, and Mr. Neuborne negotiated it without my input or advance knowledge at a time when he was Settlement Lead Counsel. The decision of Judge Block in *In re Holocaust Victims Assets Litigation*, 256 F. Supp. 150, 154 (E.D.N.Y. 2003) correctly references me as one of the negotiators of the January 1999 Escrow Agreement, not Amendment No. 1. Finally, Mr. Neuborne claims credit for passage of federal tax legislation exempting American class members from taxes on their distribution from the fund. While he lobbied for that benefit, he was not alone in doing so, and there is no indication his efforts were decisive. The legislation did not enhance the fund although it benefited some class members who were fund recipients. Under Mr. Neuborne's enhancement theory, every lobbyist for that legislation could make application for an award.

14. Mr. Neuborne gratuitously mentions in his Application that he plans to donate some of the fee he receives to NYU School of Law. I accept that Prof

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Neuborne and other lawyers are generous. But what an attorney says he will do with a fee award is irrelevant to the justification or amount of the award itself.

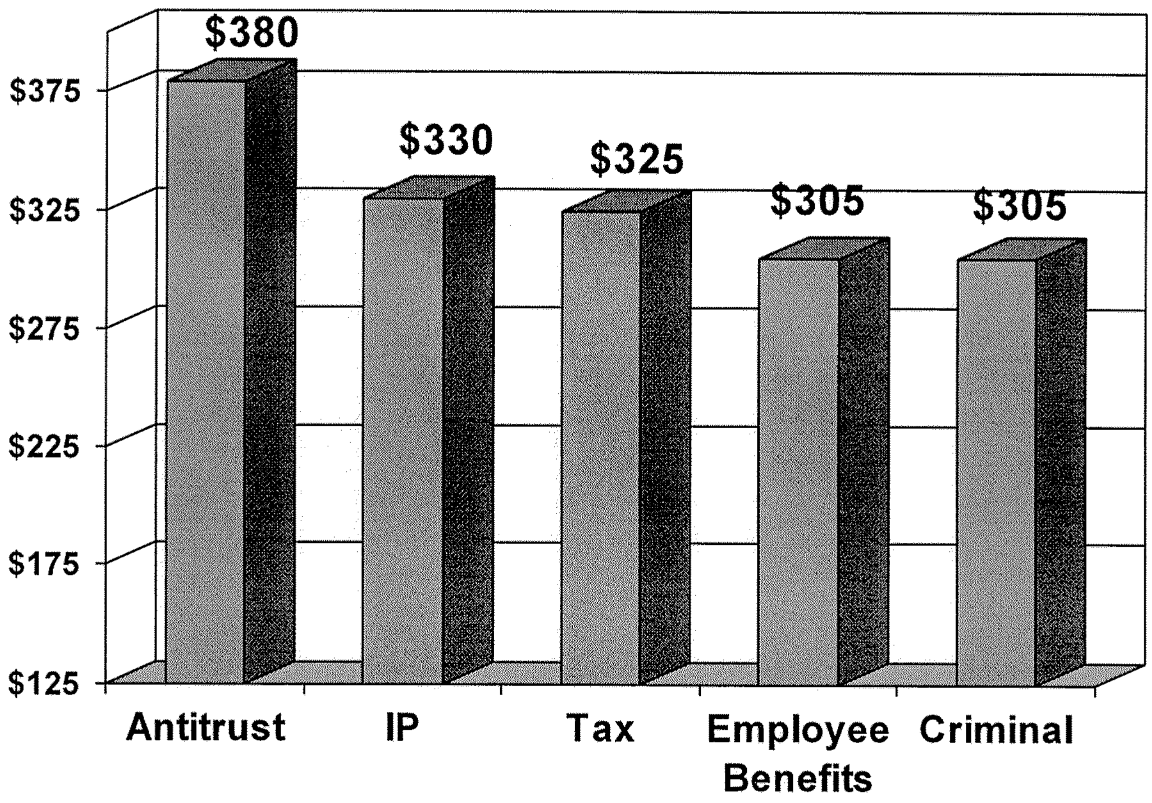
15. As a general matter, I support the payment of legal fees, with reasonable multipliers, to that very limited group of lawyers willing to take on and fund risky, difficult human rights causes and make then into viable, fund-generating cases. Without compensation in fund-generating cases, lawyers have no ability or incentive to accept other human rights cases. The Class' objection in this case is premised on: (1) Mr. Neuborne's failure to declare that he had changed his *pro bono* position and would be seeking a fee, (2) his failure to notify co-counsel and the class of his secret fee arrangement, (3) his failure to delegate work to other counsel willing to work *pro bono*, (4) his failure to allocate time between his actions on behalf of the Class and as General Counsel to the Court, and (5) anomalies in the compilation of his time.

I declare under penalty of perjury that the foregoing is true and correct.

March 17, 2006

Robert A. Swift (RS-8630)

Median Hourly Billing Rates
Litigation Specialties


$380
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Antitrust
IP
Tax
Employee Benefits
Criminal

Top Five Hourly Rates

Equity and Non-Equity Partners

Source: Altman Weil Survey of Law Firm Economics 2005 Edition